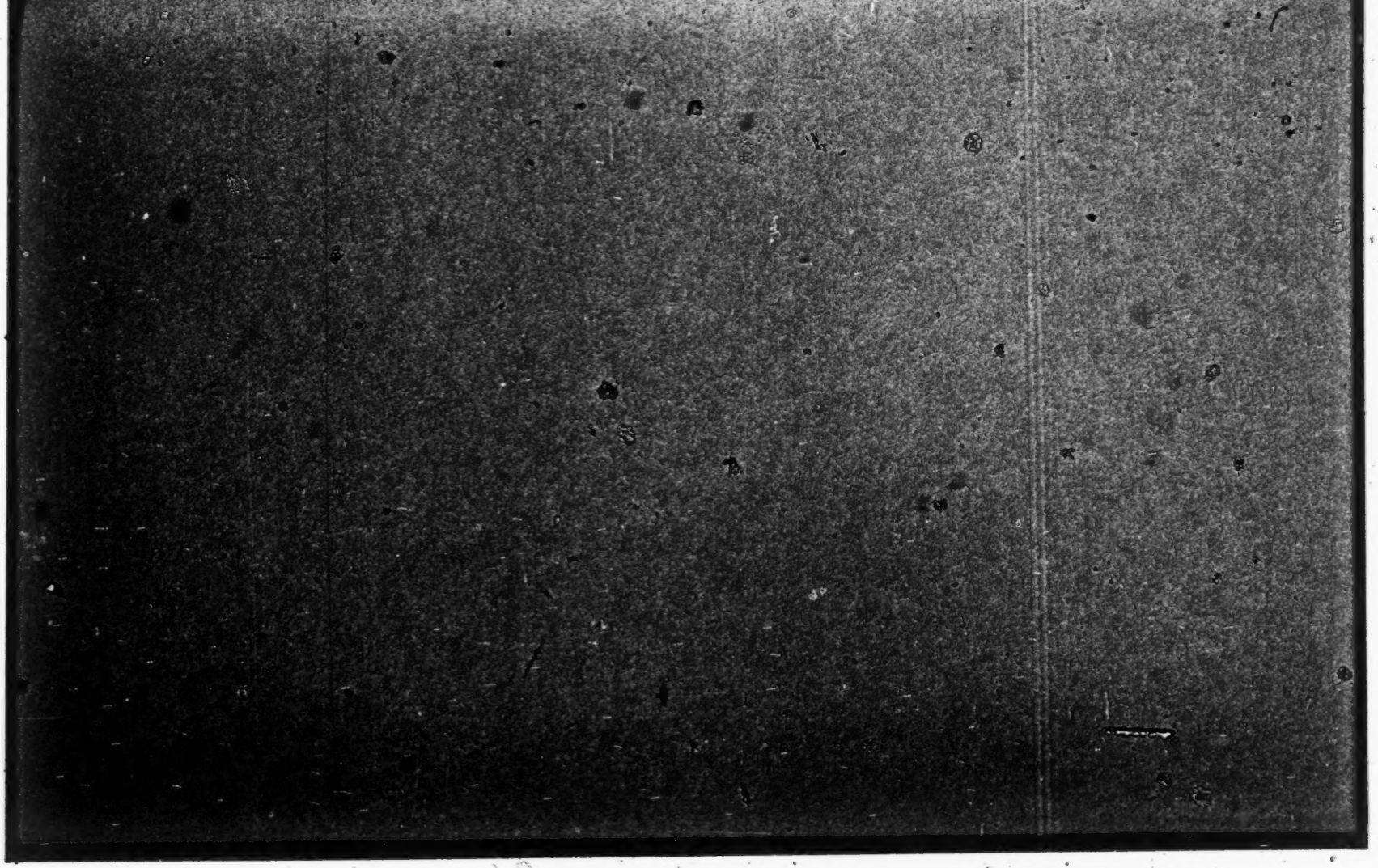
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INDEX.

SUBJECT INDEX.

PAGE

OPINIONS BELOW 1

JURISDICTION 2

RESPONDENT'S STATEMENT OF CASE 2

ARGUMENT 3

1. This Court has already ruled in a similar case that a writ of certiorari will not be issued to determine what law should have been applied by a Circuit Court in passing upon the negotiability of a written instrument 3

2. No special reason exists for disregarding settled principles and granting a writ of certiorari 5

3. The decision of the Circuit Court is a logical application of the rule of Swift *v.* Tyson, and is in line with many applications of that rule by this Honorable Court 5

4. The decision of the Circuit Court is not unique but in accord with many decisions in the various Circuit Courts 10

5. The Circuit Court, in refusing to be bound by the Florida statute and its interpretation, did not violate the full faith and credit clause of the Constitution 13

6. Under general commercial law, the notes in question are rendered non-negotiable because of uncertainty as to the amount due thereon 14

CONCLUSION 18

TABLE OF CASES CITED.

Ardmore State Bank *v.* Lee, 61 Okla. 169 16

Bank of United States *et al.* *v.* Cuthbertson, Trustee, 67 F. (2d) 182 ..... 3, 5

Brooklyn City & Newtown R. R. Co. *v.* National Bank of Republic of New York, 102 U. S. 14 ..... 9, 11

Cudahy Packing Co. *v.* State National Bank of St. Louis, 134 Fed. 538 10

Davis *v.* Brady, 17 S. D. 511 17

First National Bank of Miami *v.* Bosler, 297 Pa. 353 15

Gazlay *v.* Riegel, 16 Super. (Pa.) 501 17

Goodman *v.* Simonds, 61 U. S. 343 7

Guernsey *v.* Imperial Bank of Canada, 188 Fed. 300 11

PAGE

Ex parte Lau Ow Bew, 141 U. S. 583 5
New Miami Shores Corp. *v.* Duggan, 155 Atl. 262 15
New York Cent. R. R. Co. *v.* Lockwood, 17 Wall. 357 10
Oates *v.* First Natl. Bank of Montgomery, 100 U. S. 239 8
Overton *v.* Tyler, 3 Pa. 346 17
Peterson *v.* Metropolitan Life Ins. Co., 19 F. (2d) 74 11
Seabury *v.* Sibley, 183 Mass. 105 16
Smith *v.* Nelson Land & Cattle Co., 212 Fed. 56 11
Story *v.* Lamb, 52 Mich. 525 17
Swift *v.* Tyson, 16 Pet. 1 ..... 3, 5, 11, 14
Taylor *v.* American Bank, 63 Fla. 631 13
Thompson *v.* Whitman, 18 Wall. 457 14
Town of Newbern *v.* National Bank of Barnesville, Ohio, 234 Fed. 209 11
United States *v.* Muscatine, 75 U. S. 575 12
Watson *v.* Tarpley, 18 How. 517 ..... 7, 11
Western L. Ind. Co. *v.* Rupp, 235 U. S. 261 13
Ex parte Woods *et al.*, 143 U. S. 202 5

STATUTES CITED.

Section 240, Judicial Code, as amended by Act of February 13, 1925, c. 229 .. 2
Judiciary Act of 1879, Sec. 34, ch. 20 ..... 6, 14
Florida Negotiable Instruments Act (Fla. Laws 1897, C. 4524; Comp. Gen. L. 1927, Sec. 6760–6929) 15
Pennsylvania Negotiable Instruments Act (Act of May 16, 1901, P. L. 194) .. 15

TEXTS CITED.

Bouvier's Law Dictionary 16
Story, Commentary on Conflict of Laws 13
Williston, Negotiable Instruments (1931) 17
Willoughby, The Constitution of the United States 14

IN THE

Supreme Court of the United States

OCTOBER TERM, 1933. No. 786.

Burns Mortgage Company, Inc.,

Petitioner,

v.

Erwin M. Fried,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

OPINIONS BELOW.

Two opinions were delivered by the United States District Court for the Eastern District of Pennsylvania, per District Judge Oliver B. Dickinson. An opinion Sur Statutory Demurrer was filed May 16, 1932 (R. 15) and an opinion Sur Motion for Re-argument was filed October 10, 1932 (R. 20).

The Circuit Court of Appeals for the Third Circuit delivered an opinion written by Circuit Judge J. Whitaker Thompson, filed on September 19, 1933 (R. 34). No opinion was delivered in the denial of a rehearing on November 15, 1933 (R. 57). The decision of the Circuit Court of Appeals is reported in 67 F (2d) 352.

JURISDICTION.

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, c. 229 (43 Stat. 938), as stated in the Petitioner's Brief.

RESPONDENT'S STATEMENT OF CASE.

Petitioner brought suit in the United States District Court on six promissory notes given by Respondent in 1925 to Golden Isles Corporation for a consideration to be furnished by said Golden Isles Corporation. The consideration was never furnished. Petitioner, claiming to be the transferee, after maturity, of a holder in due course, sued on said notes in Petitioner's own name.

Each of the notes contains the following provision:

> "* * * With interest thereon (the principal sum) at the rate of 7 per cent per annum from date until fully paid. Interest payable semi-annually. * * * Deferred interest payments to bear interest from maturity at 10 per cent per annum, payable semi-annually."

The Respondent interposed an Affidavit of Defense raising questions of law in which he averred that the suit was improperly brought in the name of the Petitioner for the reasons, among others: (1) that the Petitioner could not sue in its own name since the notes were transferred to it after maturity; and (2) that the notes were non-negotiable, that the Petitioner who claimed title through the endorsement by the payee, was merely an assignee, and that, therefore, under Pennsylvania procedure the Petitioner could not sue in its own name, but only in the name of the assignor to its use.

The District Court, Dickinson, *J.*, reached the conclusion that under the procedural law of Pennsylvania there was in the Petitioner no right of action and accordingly ruled that:

(1) The obligations sued upon were not negotiable instruments under Pennsylvania law.

(2) The Statement of Claim disclosed no legal right of action in the Petitioner.

The Petitioner moved for a re-argument, which, after rehearing, was denied, and the District Court entered a judgment of *non pros* in favor of the Respondent, the Petitioner having declined to avail itself of the opportunity given it to amend by suing in the name of the payee to its use.

In an opinion by Thompson, *C. J.*, the Circuit Court of Appeals affirmed the judgment of the District Court, following the rule established in Swift *v.* Tyson, 16 Pet. 1, and applying general principles and doctrines of commercial jurisprudence (R. 36). In applying said principles and doctrines, the Circuit Court held the notes in question non-negotiable because of the uncertainty as to the amount due thereon (R. 38).

A petition for rehearing was denied by the Circuit Court of Appeals (R. 57).

ARGUMENT.

It is respectfully submitted that a Writ of Certiorari should not be granted for the following reasons:

1. THIS COURT HAS ALREADY RULED IN A SIMILAR CASE THAT A WRIT OF CERTIORARI WILL NOT BE ISSUED TO DETERMINE WHAT LAW SHOULD HAVE BEEN APPLIED BY A CIRCUIT COURT IN PASSING UPON THE NEGOTIABILITY OF A WRITTEN INSTRUMENT.

In *Bank of United States* v. *Cuthbertson,* U. S. Supreme Court, Oct. Term, 1933, No. 691, this Court, on February 5, 1934, declined to review the question whether the Negotiable Instruments Law of the State of Illinois should be regarded as a local statute and therefore binding upon the Federal Courts. In that case, reported in 67 F (2d) 182, the Circuit Court of Appeals for the Fourth Circuit had held an instrument non-negotiable, without indicating what law had been applied, but citing cases to support its decision from Georgia, Kentucky, and the United States Supreme Court, although the notes there under consideration were given in North Carolina and assigned

in Illinois, in both of which states the Uniform Negotiable Instruments Act had been passed. Disregarding the argumentative assertions of the parties in the Briefs filed in said case, the sole question presented to this Honorable Court at that time was whether the Circuit Court of Appeals had applied the proper law in deciding the question of negotiability.

The following statement of the "Reasons Relied on for the Granting of the Writ" as presented in the Petition for Writ of Certiorari in *Bank of United States* v. *Cuthbertson, Trustee, etc. supra*, is most significant. (Page 9 of Petitioner's Brief in said case.)

> "1. The Circuit Court of Appeals has decided an important question of Federal Law, which has not been but should be settled by this Court and on which there are various conflicting decisions by Circuit Courts of Appeal. The matter involves an important rule of decision in the administration of law by a Federal Court. *The specific question involved is whether the Federal Courts in construing a state Negotiable Instruments Law are bound to follow the decisions of the highest court of that state.*
>
> "2. If the Negotiable Instruments Law is regarded as a local statute, then the Circuit Court of Appeals erred in deciding that the bonds were non-negotiable as this decision is probably in conflict with applicable decisions of the Supreme Court of the State of Illinois.
>
> "3. If the Negotiable Instruments Law is to be regarded as a general law and the law merchant applies, then the Circuit Court of Appeals has erred in deciding an important question of general law in a way probably untenable and in conflict with the weight of authority, as well as in conflict with other Circuit Courts of Appeal and this Court." (Italics ours.)

In dismissing the Petition for Certiorari, this Honorable Court, of necessity, declined to review the question as to what law should have been applied. In the instant case, the argument advanced under (1) above is repeated. (Petitioner's Brief, p. 2:) The question thus presented is, therefore, precisely the same as was passed upon by this Honorable Court on February

5, 1934. It is respectfully submitted that the ruling dismissing the Petition for the Writ in Bank of United States *v.* Cuthbertson, Trustee, should be followed in the instant case.

2. No Special Reason Exists for Disregarding Settled Principles and Granting a Writ of Certiorari.

It is well settled that a writ of certiorari to review a judgment of a Circuit Court of Appeals should be reserved for weighty and serious matters; it is also well settled that it is a branch of the Supreme Court's jurisdiction which should be exercised sparingly and with great caution. *Ex Parte Lau Ow Bew*, 141 U. S. 583; *Ex Parte Woods, et al.*, 143 U. S. 202.

The Petitioner contends that the instant case is of considerable moment, in that the rights of many holders of similar notes are involved. It is submitted that rights of many holders of similar notes were also involved in *Swift* v. *Tyson, supra*, in *Bank of United States* v. *Cuthbertson, supra*, and in every decision in which written instruments were ever declared non-negotiable. The rights of other persons are always incidentally affected by a judicial decision, but that reason, of itself, is insufficient to warrant a departure from settled principles governing the issuance of certiorari. It is therefore submitted that the instant case is not unusual and is of no more general interest and importance than any other interesting point of law. To a litigant, his case is always important, but his misconception of its importance should not be controlling upon this Court.

3. The Decision of The Circuit Court is a Logical Application of The Rule of Swift v. Tyson, and is in Line with Many Applications of That Rule by This Honorable Court.

In the classic case of *Swift* v. *Tyson*, 16 Pet. (U. S.) 1; 10 L. Ed. 865 (1842), the Supreme Court was called upon to decide whether, in determining the status of a holder of negotiable paper, it was bound to follow the law of the state of New York to the effect that a pre-existing debt was not sufficient consideration to make the one taking such an in-

strument a bona fide holder. This Court, per Story, *J.*, held that it was not bound to apply the law of the state of New York, but to decide whether sufficient consideration existed according to the general principles of commercial law. In so deciding, this Court, in discussing Section 34 of the Judiciary Act of 1879, ch. 20 (referred to in Petitioner's Brief, pp. 3, 6, 17), stated at page 18:

> "It never has been supposed by us, that the section did apply, or was designed to apply, to questions of a more general nature, not at all dependent upon local statutes or local usages of a fixed and permanent operation, as, for example, to the construction of ordinary contracts or other written instruments, *and especially to questions of general commercial law,* where the State tribunals are called upon to perform the like functions as ourselves, that is, to ascertain upon general reasoning and legal analogies, what is the true exposition of the contract or instrument, or what is the just rule furnished by the principles of commercial law to govern the case. And we have not now the slightest difficulty in holding, that this section, upon its true intendment and construction, is strictly limited to local statutes and local usages of the character before stated, *and does not extend to contracts and other instruments of a commercial nature, the true interpretation and effect whereof are to be sought, not in the decisions of the local tribunals, but in the general principles and doctrines of commercial jurisprudence.* Undoubtedly, the decisions of the local tribunals upon such subjects are entitled to, and will receive, the most deliberate attention and respect of this court; but they cannot furnish positive rules, or conclusive authority, by which our own judgments are to be bound up and governed. *The law respecting negotiable instruments may be truly declared in the language of Cicero, adopted by Lord Mansfield in Luke* v. *Lyde, 2 Burr. R. 883, 887, to be in a great measure, not the law of a single country only, but of the commercial world."* (Italics ours.)

Although almost one hundred years have elapsed since this pronouncement, a faithful adherence to the principles enunciated

in Swift *v.* Tyson is well illustrated by this Court's application of the rule in the following cases:

1. WATSON v. TARPLEY, 18 How. 517, 15 L. Ed. 509 (1856).

In an action by a payee against the drawer of a bill of exchange, it appeared that drawee had not accepted the bill, whereupon the payee protested and gave notice of such fact to drawer. The drawer, however, set up the defense that a statute of the state of Mississippi, forbade action unless notice of non-presentment and non-payment *at maturity* were given. This Court, following *Swift v. Tyson,* in ruling out this defense and holding the drawer, held that the question was one of general commercial law, which the Mississippi statute and the construction given to it by the Mississippi courts could not control in the Federal courts. As a prelude to its approval of the rule of *Swift v. Tyson,* this Court stated, at page 520:

> "Whilst it will not be denied that the laws of the several States are of binding authority upon their domestic tribunals, and upon persons and property within their appropriate jurisdiction, it is equally clear that those laws cannot affect, either by enlargement or diminution, the jurisdiction of the courts of the United States as vested and prescribed by the Constitution and laws of the United States, nor destroy or control the rights of parties litigant to whom the right of resort to these courts has been secured by the laws and Constitution. This is a position which has been frequently affirmed by this court, and would seem to compel the general assent upon its simple enunciation."

2. GOODMAN v. SIMONDS, 61 U. S. 343, 15 L. Ed. 934 (1858).

In sustaining one's position as a holder in due course, where the holder took the instrument as collateral security for a pre-existing debt, this Court affirmed Swift *v.* Tyson, as an exposition of general commercial law on the question there under consideration, saying, at p. 364:

"Mercantile law is a system of jurisprudence acknowledged by all commercial nations; and upon no subject is it of more importance that there should be, as far as practicable, uniformity of decision throughout the world. A well defined and correct exposition of the rights of a bona fide holder of a negotiable instrument was given by this court in *Swift* v. *Tyson*, 16 Pet. p. 1, as long ago as 1842; and we adopt that exposition relative to the point under consideration on the present occasion; as one accurately defining the nature and character of the title to those instruments which such holder acquires when they are transferred to him for a valuable consideration. This court then said, and we now repeat, that a bona fide holder of a negotiable instrument for a valuable consideration, without notice of facts which impeach its validity between the antecedent parties the transaction may be without any legal validity. That question was not one of new impression at the date of that decision, nor was it so regarded either by the court or the learned judge who gave the opinion; on the contrary, it was declared to be a doctrine so long and so well established, and so essential to the security of negotiable paper, that it was laid up among the fundamentals of the law, and required no authority or reasoning to be brought out in its support; and the opinion on that point was fully approved by every member of the court, and we see no reason to qualify or change it in any respect."

3. OATES V. FIRST NATIONAL BANK OF MONTGOMERY, 100 U. S. 239; 25 L. Ed. 580 (1879).

In an action on a negotiable instrument, it was contended that under Alabama Law one who received a promissory note as collateral security for a pre-existing debt did not become a purchaser for value. In holding that the one taking the instrument became a purchaser for value, the court brushed aside the argument as to the applicability of the Alabama law with the following statement (p. 246):

"While the Federal Court must regard the laws of the several States, and their construction by the state courts

(except when the Constitution, treaties or statutes of the United States otherwise provide) as rules of decision in trials at common law in the courts of the United States, in cases where applicable, they are not bound by the decisions of those courts upon questions of general commercial law. Such is the established doctrine of this court, so frequently announced that we need only refer to a few of the leading cases bearing upon the subject. Swift *v.* Tyson, 16 Pet., 1; Carpenter *v.* Ins. Co., 16 Pet., 495; Watson *v.* Tarpley, 18 How., 517, 15 L. ed., 509. We have already seen that the statutes of Alabama placed under the protection of the commercial law promissory notes, payable in money at a certain designated place; but how far the rights of parties here are affected by the rules and doctrines of that law is for the Federal Courts to determine upon their own judgment as to what these rules and doctrines are.

"Upon principle and authority, we do not doubt that the defendant in error was, in the sense of the commercial law, a bona fide holder for value of the note in suit."

4. BROOKLYN CITY & NEWTOWN R. R. CO. v. NATIONAL BANK OF REPUBLIC OF NEW YORK, 102 U. S. 14; 26 L. Ed. 61 (1880).

In this case, a question involving the rights of a holder of a negotiable instrument was again considered by this court as one of general commercial law to be decided by general principles of commercial law rather than the law of a particular state. As to the nature of this commercial law, the following Statement of the Court, at page 55, is interesting:

"Commerial law, says Bouvier, is a phrase employed to denote the branch of the law which relates to the rights of property and the relations of persons engaged in commerce. Persons engaged in commercial adventures, wherever they may have their domicil, have business relations throughout the civilized world, from which it results that commercial law is less local and more international than any other system of law, except the law of nations.

"Codes, laws and ordinances of other States, says a learned writer, whether ancient or modern, are received by the courts with great respect, not as containing any authority in themselves, but as evidence of the general law merchant. Where these are contradicted by judicial decisions, they cease to have any value in the jurisdiction where the law is decided to be the other way. Levi, 2d ed., 2.

"Authoritative support to the proposition, that the decisions of the State Courts do not control in such a case, is also derived from other decisions of this court, in which every member of the court concurred. Carpenter v. Ins. Co., 16 Pet., 495, 511."

5. NEW YORK CENT. R. R. CO. v. LOCKWOOD, 17 Wall. 357; 21 L. Ed. 627 (1873).

Here, this Court refused to be bound by the law of the State of New York permitting a common carrier to exempt itself from responsibility for its negligence by a provision in the contract of carriage. It held, rather, that, although the case arose in New York, the Federal Courts would apply general principles of commercial law and, in so doing, it was compelled to declare the exemption provision invalid.

4. THE DECISION OF THE CIRCUIT COURT IS NOT UNIQUE BUT IN ACCORD WITH MANY DECISIONS IN THE VARIOUS CIRCUIT COURTS.

The principles enunciated in Swift v. Tyson and developed in the numerous decisions since that time have been followed, as indeed they should be, in the various Circuit Courts.

In *Cudahy Packing Co.* v. *State National Bank of St. Louis*, 134 Fed. 538 (1904), the Circuit Court of Appeals for the Eighth Circuit declared an instrument negotiable, despite the fact that the statutes and decisions of Missouri, in which state the instrument originated, would declare the same non-negotiable. The Circuit Court, relying on Swift v. Tyson, found no difficulty in declaring a question involving negotiable

instruments one of general commercial law, which should be determined by broad commercial principles rather than local interpretation. The same Circuit Court has repeatedly reasserted this position. *Guernsey* v. *Imperial Bank of Canada*, 188 Fed. 300 (1911); *Smith* v. *Nelson Land & Cattle Co.*, 212 Fed. 56 (1914).

In *Peterson* v. *Metropolitan Life Ins. Co.*, 19 F. (2d) 74, affirmed 19 F. (2d) 88 (1927), the Federal Court had occasion to pass upon the applicability of a provision of Iowa's Negotiable Instruments Law and decided that inasmuch as it was merely a reenactment of well-settled principles of commercial law, the Federal Court would be bound only by decisions of a superior federal court construing said provision. *Swift* v. *Tyson*, *Watson* v. *Tarpley*, *Railroad Co.* v. *National Bank*, all *supra*, were quoted with approval.

And, in *Town of Newbern*, et al., v. *National Bank of Barnesville, Ohio*, 234 Fed. 209 (C. C. A., 6th Circuit) (1916), where the construction of a Tennessee statute dealing with municipal elections was invoked to defeat the rights of bona fide holders of the bonds issued by a municipality, the court disregarded the state decisions interpreting the state statute and decided the question on broad commercial principles, which insisted upon the protection of the bona fide holders.

The decisions of this Court and of the various Circuit Courts indicate clearly that the doctrine of Swift *v.* Tyson is to be followed, where the question involved is the construction of a negotiable instrument. In this connection, it is respectfully submitted that if the Supreme Court is to apply Swift *v.* Tyson at all, it should certainly do so in construing the provisions of the Uniform Negotiable Instruments Law. If it does not, the salutary purpose of the act is defeated. According to Petitioner's contention, the interpretation of the state where the note is given should control everywhere, regardless of how illogical, ill-reasoned or far removed from the general commercial law it might be. To adhere to such a rule would mean that an erroneous Florida decision would automatically control every court in the country in the interpretation of an instrument similar to those under consideration in the instant case, and every court would be compelled to acquiesce in the erroneous position and blindly trail along in the wake of the state court

giving its peculiar interpretation of the statute. Respondent submits that this is the very condition sought to be avoided by the rule of Swift v. Tyson, as will be seen from the following excerpt from the Court's opinion in *United States* v. *Muscatine*, 75 U. S. 575, 582; 19 L. Ed. 490, 493 (1869), when, in answering the argument that the State law should control, it stated:

> "There are several adjudications of the highest court of the State more or less adverse to the views we have expressed. We do not deem it necessary more particularly to advert to them. Entertaining the highest respect for those by whom they were made, we have yet been unable to concur in the conclusions which they announce. It is alike the duty of that court and of this to decide the questions involved in this class of cases, as in all others, when presented for decision. *This duty carries with it investigation, reflection and the exercise of judgment. It cannot be performed on our part, by blindly following the footsteps of others and substituting their judgment for our own.*
>
> *"Were we to accept such a solution we should abdicate the performance of a solemn duty, betray a sacred trust committed to our charge, and defeat the wise and provident policy of the Constitution which called this court into existence."* (Italics ours.)

The Uniform Negotiable Instruments Law was conceived and urged upon each state with a dual object in mind, to do away with distinctions drawn by particular states and to codify the general commercial principles developed by the law merchant, so that persons engaged in commercial enterprises throughout the nation would have confidence in, and deal with, negotiable paper secure in their knowledge that this paper, known to them and to their predecessors for years, would continue to have the same meaning, regardless of local or sectional interpretations. Petitioner's contention is dangerous in the extreme, as it attributes to an individual state sovereignty in a field in which it never has been, and in which it is not entitled to be, supreme.

5. THE CIRCUIT COURT, IN REFUSING TO BE BOUND BY THE FLORIDA STATUTE AND ITS INTERPRETATION, DID NOT VIOLATE THE FULL FAITH AND CREDIT CLAUSE OF THE CONSTITUTION.

The Circuit Court, in deciding as it did, in no way violated Article IV, Section 1, of the Constitution by refusing to give full faith and credit to the Florida statute and decisions interpreting that statute. The full faith and credit clause is not applicable to the situation before this Honorable Court, inasmuch as there is no question raised as to the validity of the Florida statute. It is admitted that the Act was properly adopted and that, as to all situations to which it applies under the constitution and laws of the United States and the several states, it is effective. Assuming however, that the notes considered in *Taylor* v. *American Bank*, 63 Fla. 631, 57 So. 678 (1912), were identical with the notes now under consideration (which is not the case), the Circuit Court, by its decision, disagrees with the interpretation placed upon the Florida statute by the Florida Court, in effect, it says that proper principles of commercial law would dictate an exactly opposite ruling and, inasmuch as the Circuit Court is bound, under *Swift* v. *Tyson* and kindred cases, to apply principles of general commercial law, it must rule the instrument under consideration non-negotiable regardless of what the Florida Supreme Court would do if passing upon a similar instrument.

The construction most favorable to Petitioner that can be placed upon the action of the Circuit Court is that it has interpreted the Florida statute differently from the Florida Court. It is, however, well settled that where the validity of a state statute is not in question, and the controversy turns merely upon its interpretation or construction, no question arises under the "full faith and credit" clause of the Federal Constitution. *Western L. Ind. Co.* v. *Rupp*, 235 U. S. 261; 59 L. Ed. 220 (1914).

It is respectfully submitted that Petitioner loses sight of the nature of the full faith and credit clause. That clause, and the acts of Congress under it, establish a rule of evidence rather than one of jurisdiction. As stated by Mr. Justice Story in his Commentary on the Conflict of Laws, Sec. 609:

> "The Constitution did not mean to confer any new power upon the states, but simply to regulate the effect of the

> acknowledged jurisdiction over persons and things within their territory. It did not make the judgments of other States domestic judgments to all intents and purposes, but only gave a general validity, faith and credit to them as evidence."

See also Vol. 1, Willoughby, *The Constitution of the United States*, Sec. 148; *Thompson* v. *Whitman*, 18 Wall. 457; 21 L. Ed. 897 (1874).

The full faith and credit clause must be read in the light of the other provisions of the Constitution and laws thereunder, particularly Article III dealing with the Judicial Power, Section 34 of the Judiciary Act (R. S. 721) and the numerous cases construing said Act, noticeably *Swift* v. *Tyson*, *supra*.

6. UNDER GENERAL COMMERCIAL LAW, THE NOTES IN QUESTION ARE RENDERED NON-NEGOTIABLE BECAUSE OF UNCERTAINTY AS TO THE AMOUNT DUE THEREON.

According to the law merchant and the modern general commercial law founded upon the principles established by the law merchant, an instrument to be negotiable had to conform to certain requirements, one of which was that it must contain an unconditional promise or order to pay a sum certain in money. The various states, in adopting the Uniform Negotiable Instruments Act, containing this requirement, were establishing no peculiar local policy, but were merely reasserting a familiar principle of commercial law. In some portions of the Act, the various Legislatures may have sought to engraft new provisions considered by them as improvements upon the old principles, but not so with the requirement of certainty, for in that element lay the instrument's real value. Notes such as those involved in the present action were to be used in commercial dealings and were to pass freely about as representing a certain amount of value, in other words, were to take the place of money in commercial transactions. To accomplish these objects, it is absolutely essential that the instrument reveal, from the instrument itself, without resort to outside sources, that at any given date, a sum certain was due or would be due. The Circuit Court,

in the instant case (R. pp. 37, 38) ponted out that if the maker of an instrument is to be held liable in a suit by a holder for whatever sum appears to be payable from the face of the instrument, and barred from defenses available against the original payee, the extent of his liability must appear upon the face of the note; otherwise there is no certainty as to the sum due. The notes in question clearly lack that certainty.

In *First National Bank of Miami* v. *Bosler*, 297 Pa. 353 (1929), the Supreme Court of Pennsylvania, an important commercial state, ruled that the commercial law requirement of certainty embodied in the Negotiable Instruments Law of Florida (Fla. Laws 1897 C4524; Comp. Gen. L. 1927 Sec. 6760-6929) and Pennsylvania (Act of May 16, 1901, P. L. 194) meant that, if the note contained a provision for interest "it must clearly appear, from the note itself, that at any given date the two (*i. e.*, principal and interest) will always aggregate 'a sum certain.'" It accordingly declared the notes there under consideration non-negotiable as the "sum certain" was not apparent from the face of the instrument. And in another important commercial jurisdiction, New Jersey, in *New Miami Shores Corporation* v. *Duggan*, 155 Atl. 262, affirmed 160 Atl. 619, the Pennsylvania decision in *First National Bank* v. *Bosler*, *supra*, was approved and followed. The Circuit Court of Appeals approved the reasoning and conclusions reached in these cases (R. p. 38).

The notes in the instant case are even more uncertain than those involved in the Bosler case. It will be recalled that each note contains the following provision:

> "with interest thereon (the principal sum) at the rate of 7 per cent. per annum from date until fully paid. Interest payable semi-annually. * * * Deferred interest payments to bear interest from maturity at 10 per cent. per annum, payable semi-annually."

It will also be recalled that the notes are all dated August 28, 1925, and are payable February 28, 1926; August 28, 1926, February 28, 1927; August 28, 1927, February 28, 1928, and August 28, 1928, respectively. Taking for purposes of illustration, the note payable August 28, 1928, that instrument, if tendered to a person in payment of a bill of goods; or in

some other transaction between merchants prior to August 28, 1928, would not indicate, with any semblance of accuracy, the "sum certain" it is supposed to represent. It calls for a principal sum of $1000, with interest at 7 per cent. from August 28, 1925, "until fully paid." It also calls for "interest payable semi-annually." The logical inquiry then follows—has this interest been paid? The instrument itself reveals no notation of interest payments. It contains no interest coupons which, if still attached, would indicate that interest had not been paid and would enable a prospective purchaser to calculate quickly what the note called for. But the difficulties of one taking the instrument do not stop there. Assuming that someone furnishes information to the effect that some, or all, of the five interest payments have been paid, a person anxious to acquire the instrument still cannot tell what sum is to be paid at maturity of the instrument. He must inquire as to the exact date on which each interest payment was paid. For, if any payments of interest were "deferred," those deferred payments bear interest at ten per cent. From what date? Here again a serious ambiguity exists, as each note contains the provision "Deferred interest payments to bear interest from maturity at 10% per annum, payable semi-annually."

"Maturity" when applied to commercial paper means the time when the principal sum of a bill or note becomes due and demandable.

> *Ardmore State Bank* v. *Lee*, 61 Okla. 169, 159; Pac. 903 (1916);
>
> *Seabury* v. *Sibley*, 183 Mass. 105, 66 N. E. 603 (1903);
>
> *2 Bouvier's Law Dictionary* (3rd Edition), p. 2122.

In *First National Bank of Miami* v. *Bosler*, *supra*, in which the provision under consideration was "Deferred payments are to bear interest from maturity at ten per cent. per annum semi-annually," it is evident that the Court considered the term "maturity" as meaning the time when the principal was due. But the Petitioner contends that this ordinary, accepted meaning of the term "maturity" is not to prevail in the instant case. In the case under consideration, it is urged that "maturity" refers not to the principal debt, but to the due date of the interest payments themselves. Clearly,

a real ambiguity exists here. Exactly what was meant by the use of the term "maturity" and what was contemplated by the provision? Petitioner contends it was surely the intent of the parties that, as each interest payment was not made, interest at the increased rate was to run on the small amount of unpaid interest and continue to run until paid. Is it not equally as reasonable to suppose that the maker intended to allow all unpaid interest to accrue without penalty until maturity of principal, at which time unpaid interest would be lumped together and bear interest at the increased rate from the date of the maturity of principal.

Obviously, there are two possible constructions, each logical and warranted by the language of the instrument. The note does not definitely indicate which is the true construction, and, being capable of both, cannot be said to be certain.

The Pennsylvania court, in the Bosler case, *supra*, and the New Jersey court in *New Miami Shores Corporation* v. *Duggan*, *supra*, in ruling as they did, were merely reasserting a settled principle of construction that the negotiability of a written instrument is to be determined by what appears upon the face of the paper, unaided by outside proof. *Gazlay* v. *Riegel*, 16 Super. (Pa.) 501 (1901); *Overton* v. *Tyler*, 3 Pa. 347 (1846); *Davis* v. *Brady*, 17 S. D. 511 (1903); *Story* v. *Lamb*, 52 Mich. 525 (1884). As stated in Williston, Negotiable Instruments (1931), p. 37:

> "It is a cardinal principle that the negotiability of an instrument must be capable of determination from its face and not be dependent on extrinsic circumstances."

Under the principles established by the law merchant, negotiable instruments were to be for a sum certain, in order that they fulfill their proper functions as media of exchange and pass freely and unrestrictedly among business men and commercial houses. The classic simile used by Gibson, J., in Overton *v.* Taylor, 3 Pa. 347 (1846), when he declared that the negotiable instrument was a "courier without luggage," accurately describes the original idea of such instruments. Courts with a view towards preserving this original idea have repeatedly frowned on the addition of clauses and provisions which would

impede the passage of this "courier," recognizing that if the instrument contains novel or ambiguous provisions, persons to whom it is tendered in commercial transactions will be inclined to be wary and refuse to accept it. Inasmuch as the provisions under consideration have such effect, it is respectfully submitted that it is not the sort of negotiable instrument contemplated by the law merchant and should not be sustained as such.

The decision in the instant case, in line with that of Pennsylvania in *First National Bank of Miami* v. *Bosler*, *supra*, and *New Miami Shores* v. *Duggan*, *supra*, indicates a refreshing adherence to sound principles of commercial law, and it is therefore submitted, should not be disturbed.

CONCLUSION.

In view of the fact that this Court has so recently had the precise question presented to it and at that time declined to review the decision of the Circuit Court in a case of startling similarity, it is the contention of Respondent that Petitioner's request for a Writ of Certiorari should be denied in the instant case, particularly since Petitioner has failed to show the special and important reasons for the Writ required by this Honorable Court.

It has been shown that the Circuit Court, in its decision, merely followed well-recognized principles, and acted in accord with the decisions of this Honorable Court and the decisions of other Circuit Courts of Appeals in applying the general commercial law to the question under consideration.

It has been further shown that the Circuit Court correctly applied these general principles of commercial law in ruling the notes in question non-negotiable because of uncertainty.

It has also been shown that, by so acting, this Court violated no provisions of the Federal Constitution and that, in fact, its action was required by the Federal Constitution, the Acts of Congress and the decisions of the Federal Courts interpreting said Constitution and laws thereunder.

For the foregoing reasons, it is the contention of Respondent that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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